



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Board Of Review Decision

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Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which found the employer to be a partial successor business under G.L. c. 151A, §§ 14(n) and 14N, and thereby responsible for the unemployment benefit charges of another corporation with the same ownership. We review pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On May 21, 2008, the DUA Employer Liability Unit issued a determination that the employer was a partial successor organization and liable for a portion of the experience rating account of its predecessor. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits, a DUA review examiner affirmed the agency's determination in a decision rendered on October 17, 2008. Our decision is based upon a review of the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether by hiring two short-term trainees from another business with the same owners, the new corporation acquired a portion of the owners' existing business as set forth under G.L. c. 151A, § 14N.

Findings of Fact

The DUA review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The [employer] was incorporated in June of 2007. The business is a liquor store. The business address is [employer's address]. The treasurer had fifty percent of the shares of the business. The treasurer's wife held the other fifty shares and her position was president.
2. The employer filed an on-line registration with DUA for the [employer] on January 10, 2008.
3. Upon receiving the on-line registration the DUA Status Department cross referenced the employer name and became aware of another business D/B/A [predecessor]. That business was a liquor store, located at [predecessor's address] and was incorporated on November 1, 2004. The officers of that business were the same as the officers of the [employer].
4. The employer was then contacted by the DUA Status Department to submit a paper version of the Form 1110-A.
5. The employer submitted an Employer Status Report, Form 1110-A with a date of January 14, 2008 indicating that there was a transfer of two employees from the [predecessor] to the [employer].
6. The employer was issued a letter from the Division dated January 22, 2008 indicating in part that 'this letter will acknowledge receipt of your application to obtain a Division of Unemployment Assistance (DUA) account number. The information submitted on the application – Employer Status Report Form 1110-A is incomplete and additional information must be provided in order to make a determination under Section 14N of MGL Chapter 151A. The boxes checked were 'predecessor information' and 'other,' indicating 'you must complete an Employer Status Report in its entirety. Answer all questions in all sections. You must complete page 7 of 8. The DUA cannot process your reporting without this required wage detail.'
7. The employer submitted a letter to the Division dated February 15, 2008 with additional information, including the completed page 7 of the Employer Status Report.

8. Two individuals were hired and trained at [predecessor], whereupon they worked at that location for two months, then were transferred to the [employer] in November, 2007.

9. On May 21, 2008, the employer was issued a notification from the Division of Unemployment Assistance indicating that 'in a previous letter you were notified that you were subject to the Massachusetts Unemployment Insurance Law (M.G.L. Chapter 151A) on your company's own record and assigned [employer number]. Information now available indicates that you acquired a portion of the business of the [predecessor] on November 4, 2007. Since it has been determined under Section 14N(a)(c), (e)(f) & Section 14(n)(1) that you acquired a portion of an organization, trade or business of another employer in which there is substantially common ownership, management or control, 2% of the experience rating account of the [predecessor], has been transferred to your organization and your organization's contribution rate has been recalculated. Due to this partial transfer you have been assigned a new DUA account number. Your DUA account number is [employer account number].' The employer filed an appeal to that determination on May 22, 2008.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 14N, provides, in pertinent part, as follows:

(a) If an employer transfers its trade or business, or a portion thereof, to another employer or employing unit and, at the time of transfer, there is substantially common ownership, management or control of the transferor and transferee, then the account of the transferor shall be transferred to the transferee... The transfer of some or all of such employer's workforce... shall be considered a transfer of trade [or] business when, as a result of the transfer, the transferring employer no longer performs that portion of the trade or business with respect to the transferred workforce, and the trade or business is performed by the employer to whom the workforce is transferred.

G.L. c. 151A, § 14(n), provides, in relevant part, as follows:

(1) If the entire organization, trade or business of an employer, or substantially all the assets thereof, are transferred to another employer or employing unit, the transferee shall be considered a successor....

In the present case, there is no dispute that both the appellant, [employer], and its alleged predecessor, [predecessor], were owned by the same corporate officers. Moreover, both corporations operated the same type of liquor store business. However, we disagree with the review examiner's legal conclusion that there has been a transfer of a portion of [predecessor's] trade or business.

The term "transfer" is not defined under the statute. Therefore, we look to the plain meaning of the word and rely on the following dictionary definition for guidance: "To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. ... To sell or give." Black's Law Dictionary, 1504 (7th ed. 1999.) Since nothing in the record shows that [predecessor] transferred any assets besides the two employees, G.L. c. 151A, § 14(n), which pertains to transfers of an entire business, does not apply.

The review examiner based her decision on the fact that two employees were transferred to the appellant. That is not enough to be considered a transfer of business under G.L. c. 151A, § 14N. The statute requires that, as a result of transferring some of its workforce, the transferring employer ceases to perform the portion of its business that had been performed by those employees. The two employees worked for [predecessor] for only two months in order to be trained begin working at the [employer] location when it opened. We found no evidence that [predecessor] stopped performing any portion of its liquor store business after these trainees were hired by [employer].

We, therefore, conclude as a matter of law that there is insufficient evidence to establish a transfer of a portion of a business within the meaning of G.L. c. 151A, § 14N.

The DUA review examiner's decision is reversed. The appellant is not required to assume any portion of [predecessor's] experience rating account.

BOSTON, MASSACHUSETTS**DATE OF MAILING - December 4, 2008**

/s/

John A. King, Esq.
Chairman

/s/

Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**(See Section 12, Chapter 151A, General Laws Enclosed)****LAST DAY TO FILE AN APPEAL IN COURT – January 5, 2009**

AB/lw